No. 93-85

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THE WHEELABRATOR CORPORATION,
Petitioner,

v.

KENNETH P. BIDLACK, STANLEY DWORECKI, HELEN MARKER, HOWARD W. SNYDER and ZELMA WESCO, on behalf of themselves and all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The plaintiffs are a class of retired hourly employees from the Wheelabrator plant in Mishawaka, Indiana, their spouses and the surviving spouses of their deceased fellow retirees. The retirees were members of bargaining units represented by the UAW and its Locals 995 and 5, which negotiated a series of collective bargaining agreements with Wheelabrator. The last of these agreements expired in 1988, shortly after Wheelabrator closed its Mishawaka plant. Wheelabrator continues to operate at other facilities.

Since 1965, the collective bargaining agreements have provided for the payment of health insurance premiums under the following language:

> Those employees who have retired since September 22, 1959 will have the full cost of their Blue Cross-Blue Shield coverage paid by the Company after they attain 65 years of age . . . (Pet. A46)

Subsequent negotiations provided that "benefits shall be continued for the spouse after the death of the retiree." (Pet. A47)

No separate formal plan was prepared or distributed by the employer, apart from the collective bargaining agreements. The employer provided the employees with a summary plan description ("SPD") describing the benefits to be provided. The SPD contained no language indicating that the plan had a termination date or that it was subject to modification or termination by the employer.[1]

Two months after the retiree insurance agreement was first negotiated in 1965, the employer in a letter to retirees stated that "Effective on July 1, 1966, and thereafter during your lifetime, the Company will continue to pay the full cost of your Blue Cross-Blue Shield premium." (Pet. A46) For twenty-three years after these benefits were negotiated, the employer gave every retiring employee a document entitled "Your Benefits As A Union Retiree Of Wheelabrator-Frye Inc." which stated under the subtitle Medical Insurance: "Both you and your spouse will be covered for the remainder of your lives." (Pet. A47)

Both union and employer representatives who were responsible for the negotiation and/or administration of these provisions from 1965 to 1985 stated in their depositions that these benefits were intended to last "forever, as long as they [retirees and spouses] live." In written correspondence to surviving spouses as late as 1987, the company wrote: "Your medical coverage will continue

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[1] In fact, no termination or modificaiton language was included in any SPD prepared by the company until 1989, shortly after the company had announced its intention to unilaterally reduce retiree benefits.

for your lifetime, with no changes in the type of benefits you had previously."

In collective bargaining agreements since 1965, the company and union negotiated additional medical benefits for retirees, including major medical, dental, vision, hearing and prescription drug coverage. These provisions were negotiated separately for retirees and went into effect at different times for retirees than for active employees. The 1981 agreement provided expressly that the company's Blue Cross-Blue Shield coverage will provide "Dental, Vision and Hearing for all Retirees." The 1985 agreement significantly modified the health insurance plan for active employees and future retirees, but the coverage for existing retirees, under what was now termed "Plan 1," remained unchanged.

In 1988, Wheelabrator closed its Mishawaka plant and the last negotiated collective bargaining agreements expired. In February, 1989, Wheelabrator informed retirees that, effective on March 1, 1989, their insurance benefits were being changed to significantly reduce benefits and increase retiree costs.

The retirees filed a class action in federal court for breach of the collective bargaining agreements which created their rights to medical benefits after retirement. The retirees also alleged parallel violations of the Employee Retirement Income Security Act ("ERISA"), based on the employer's violation of the terms of the benefit plan embodied in the applicable labor agreements.

The district court granted the employer's motion for summary judgment and dismissed the case. The district judge held that the language of the agreement did not provide for the continuation of retiree benefits after expiration of the last collective bargaining agreement and, therefore, the employer had no continuing duty to provide retiree benefits at any level. The district court considered only language in the collective bargaining agreements and in insurance contracts negotiated betwen the employer and

private insurers. The court refused to consider any other evidence of the parties' intent in order to determine the scope and duration of the contractual provisions governing retiree insurance.

The Seventh Circuit *en banc* reversed the district court. The issue on appeal, in the court's view, was whether the district court was correct in refusing to consider the "extrinsic" evidence offered by retirees "even though some contractual language and a great deal of 'extrinsic' evidence . . . suggest that the parties may have intended to confer vested rights on the retired employees." (Pet. A3) The Seventh Circuit concluded that the contractual language was sufficiently ambiguous that consideration of extrinsic evidence was required to determine the imperfectly expressed intent of the parties, and therefore remanded the case to the district court for further proceedings.

The court also rejected the employer's contention that the collective bargaining agreement unambiguously establishes that the benefits, even if vested, could be reduced to the level provided for active employees at other locations. The court found that the contractual language supported competing interpretations of the agreement on the issue of the level of benefits to which retirees may be entitled. Accordingly, summary judgment for the employer was reversed and the case was remanded to the district court for consideration of additional evidence on this issue as well.

REASONS FOR DENYING THE WRIT

I. THE SEVENTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE SUPREME COURT'S DECISION IN *LITTON FINANCIAL PRINTING DIVISION v. NLRB*

The issue presented for review here is an extremely narrow one: when a labor agreement is ambiguous regarding the intended duration of retiree health benefits, should courts allow the introduction of "extrinsic" evidence bear-

ing on that question of contract interpretation. The court below found that the intent of the parties was not unambiguously discernible from the language of the contract itself and therefore remanded the case in order to allow presentation of additional evidence regarding the intent of the parties. As Judge Posner's decision stated:

> The contract in this case is ambiguous and both sides are poised to present testimony and documents that they claim will disambiguate it. We think they should be allowed to do so . . . (Pet. A14)

The court therefore remanded the case to the district court for consideration of additional evidence bearing on the patries' intent. The Seventh Circuit neither rendered a contract interpretation decision nor suggested to the district court any particular method for doing so. Instead, the Seventh Circuit merely determined that the parties should be allowed to introduce extrinsic evidence in support of their interpretations and remanded the case to the district court for further evidentiary proceedings. The only issue presented for review at this stage in the proceedings, therefore, is whether contractual ambiguities should be resolved after review of such evidence.

1. Since Petitioner spends most of its time arguing that the Seventh Circuit decision conflicts with *Litton Financial Printing Division v. NLRB*, —— U.S. ——, 111 S.Ct. 2215, 115 L.Ed.2d 177 (1991), we will address that argument first.

The *Litton* decision does not address in any way the question presented here. The Court in *Litton* was not presented with a question of whether to allow consideration of "extrinsic" evidence bearing on the intent of parties to a labor agreement. Instead, the parties in the *Litton* case were apparently allowed to introduce whatever evidence they wished; there is no discussion regarding the scope of permitted evidence in that decision at all.

2. Nor does the *Litton* decision announce any principle of contract interpretation that conflicts with the Seventh Circuit's decision to allow introduction of extrinsic evidence here.

In *Litton* the Court considered the issue whether and in what circumstances a duty to arbitrate grievances survives expiration of a collective bargaining agreement. The Court determined that the duty will generally surive as to rights which "arise under" the expired agreement. A right will be held to "arise under" an expired agreement, according to the Court, if, *inter alia*, that right "accrued or vested under the [expired] agreement, or where, under normal principles of contract interpretation, the . . . right survives expiration of the contract." 111 S.Ct. at 2225.

As the decision in *Litton* recognizes, therefore, the parties to collective bargaining agreements may provide for rights that extend beyond the term of any particular contract. And, while the Court there determined that the seniority rights at issue involved neither a vested right nor one which could be read to survive the contract's expiration, the Court stated that "normal principles of contract interpretation" should continue to guide courts in determining whether the parties have intended that a particular contractual benefit "survives expiration of the remainder of the agreement." 111 S.Ct. at 2226.

This is precisely the analysis followed by the Seventh Circuit in this case. The court recognized that *Litton* prescribed both a rule that obligations do not ordinarily survive the expiration of a collective bargaining agreement and an exception for accrued or vested rights which "as a general matter" do outlive the agreement. (Pet. A7 quoting *Litton*, 111 S.Ct. at 2226.) The task for the district court on remand will be to determine whether the retiree benefits at issue here are subject to the rule or to the exception.

The court determined that the district court's grant of summary judgment should be reversed by looking initially

at the contractual language. It found some language to support a determination that the benefits provided to retirees and their surviving spouses were intended to last for the rest of their lives. While the language in favor of the retirees was not conclusive, the court found it sufficient in the context of the agreement as a whole to create an issue of interpretation which must be resolved after consideration of extrinsic evidence.

The Seventh Circuit Court's decision is nothing more than a remand to the lower court for consideration of all available evidence of the intent of the parties. This determination is entirely consistent with *Litton* and is therefore not worthy of review.

3. Petitioner is also entirely incorrect in arguing that *Litton* stands for the proposition that entitlements do not survive contract expiration absent explicit language to the contrary. As the *Litton* Court stated:

> [C]ontractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement. *Exceptions are determined by contract interpretation. Rights which accrued or vested under the agreement will, as a general matter, survive termination of the agreement.* And of course, if a collective bargaining agreement provides in explicit terms that certain benefits continue after the agreement's expiration, disputes as to such continuing benefits may be found to arise under the agreement . . . [111 S.Ct. 2226, emphasis added]

Thus, the *Litton* Court explicitly recognized that rights will survive contract expiration, *either* when such rights are "accrued or vested" under the contract *or* when the parties have designated those rights for survival. *Litton* further instructs the courts to apply "normal principles of contract interpretation" to determine whether rights created by a labor agreement have vested or accrued or have otherwise been designated by the parties to survive contract expiration.

The Seventh Circuit determined only that "normal principles of contract interpretation" here require consideration of all available evidence to resolve the contractual ambiguity and therefore remanded the case to the district court for further proceedings. That determination in no way conflicts with *Litton* or any other decision of this Court.

II. THE SEVENTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT

1. As already described, the only issue presented for review here is whether the Seventh Circuit was incorrect in remanding this case for introduction of additional evidence bearing on the intent of the parties to the labor agreement containing ambiguous language regarding the duration of retiree health insurance benefits. Thus, the Seventh Circuit's decision is limited to a determination that the parties should be "allowed" to "present testimony and documents" in support of their efforts to resolve a contractual ambiguity. (Pet. A14).

This proposition—that contractual ambiguities should be resolved after review of all available evidence of the intent of the contracting parties—is entirely unremarkable and has been unanimously accepted by the circuits that have considered the issue.[2] Neither petitioner nor the

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[2] E.g. Fifth Circuit: *United Paperworkers International Union v. Champion International Corporation*, 908 F.2d 1252, 1256 (5th Cir. 1990) ("If the court finds the contract to be ambiguous, the determination of the parties intent becomes a question of fact, and extrinsic evidence of intent may be introduced."); Sixth Circuit: *Smith v. ABS Industries, Inc.*, 890 F.2d 841, 846 n.1 (6th Cir. 1989) ("[E]xtrinsic evidence may be properly introduced to resolve [contractual] ambiguit[ies]," citing *UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1480 (6th Cir. 1983) *cert. denied* 465 U.S. 1007 (1984); Eighth Circuit: *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512, 1517 (8th Cir. 1988) *cert. denied sub nom, Anderson v. Shattery Group, Inc.*, 489 U.S. 1051 (1989) ("[I]f the contract is

Amicus in its support have been able to cite a single case from any circuit which holds otherwise.[3] Neither Petitioner nor the Amicus has been able to demonstrate that any other circuit court would have reached a different result in this case.

2. Petitioner asserts generally that the circuits are in conflict in their approach to interpretation of collective bargaining agreements in this area, citing the dissent in the decision below. (Pet. 25-26) The different results reached in the cases cited in that passage from the dissent, however, reflect nothing more than the variety of factual circumstances in which the lower courts have been asked to intercede. It is certainly not surprising that employers have prevailed in some retiree insurance disputes while retirees have prevailed in others. But that lack of unanimity of result reflects only the variety of contractual provisions and factual circumstances addressed by the courts below.

The range of decisions of various courts interpreting retiree insurance provisions indicates that the inquiry is particularly fact sensitive. This is demonstrated by comparing the decision below with previous decisions in the same court. In *Senn v. United Dominion Industries, Inc.*,

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deemed ambiguous, then the court may weigh extrinsic circumstances to aid in its construction," quoting *UFCW Local 105-A v. Dubuque Packing Co.*, 756 F.2d 66, 69 (8th Cir. 1985).

[3] Amicus American Automobile Manufacturers Association ("AAMA") indicates that it prefers the "rule previously adopted by the Seventh Circuit in *Senn v. United Dominion Industries, Inc.*, 951 F.2d 806, 816 (7th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3851 (June 21, 1993)." (AAMA Brief at 10). To the extent that the *Senn* panel endorsed a "rule" which is in conflict with the reasoning of this case, of course, any such "rule" was short-lived and has now been overruled by the Seventh Circuit's *en banc* decision here. And, as stated in text, no other circuit has announced any "rule" under which extrinsic evidence is not available to resolve contractual ambiguities.

951 F.2d 806 (7th Cir. 1992), *cert. denied* 61 U.S.L.W. 3848, (June 21, 1993), the court found that the language of a collective bargaining agreement unambiguously failed to provide for lifetime benefits where the retiree insurance provision stated merely that the company "will continue for retirees" the benefits provided in the agreement. In its decision below, the Seventh Circuit distinguished its prior decision in *Senn* on the grounds that the language in support of the retirees' claim was weaker in *Senn* and that other contextual evidence indicated an intent to limit the duration of the benefits in that case.

In *Ryan v. Chromalloy American Corp.*, 877 F.2d 598 (7th Cir. 1989), the Seventh Circuit also found the contractual language unambiguous. In *Ryan*, language incorporated by reference in the collective bargaining agreement provided an express right to terminate the retiree insurance benefits. The court found no conflicting language in the agreement to support a claim that the benefits vested in spite of this reserved right.

These differences in result, we believe, are entirely attributable to differences in contractual language and other factors properly considered by the lower courts. To the extent that the circuits have adopted different interpretive approaches or methodologies regarding the question which will be presented ultimately in this case—whether the retiree benefits are vested—that question is not presented by this case in its present posture. For, as described above, the only question decided by the Seventh Circuit at this stage is whether extrinsic evidence should be admissible in order to resolve contractual ambiguities. And, as also described above, no circuit has disagreed with the Seventh Circuit's conclusion that extrinsic evidence should be available to assist courts in that context.

If, following the remand, the court below in fact interprets the labor agreement at issue here by a method different than that adopted in other circuits, either party will

have the opportunity at that time to seek review by this Court. At this point, however, there is no reason to believe that will be the result. All that has occurred to date is that the court below has joined the other circuits and determined that all available evidence should be made available to the tribunal charged with resolving a contractual ambiguity.

3. In fact, the interlocutory nature of the decision of the Seventh Circuit provides an independent basis on which the Petition should be denied here. This Court has long disfavored the grant of *certiorari* with respect to interlocutory decisions. *American Construction Co. v. Jacksonville T. & K.R. Co.*, 148 U.S. 372, 384 (1893); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (*certiorari* should be granted as to interlocutory decisions only in "extraordinary" cases).

There is nothing "extraordinary" about the present situation, and there is no reason that the employer here needs interlocutory review to avoid undue hardship. The Seventh Circuit decision is merely the equivalent of a denial of summary judgment by the district court. If the Seventh Circuit's decision is allowed to stand, the case will be remanded to the district court where both the employer and the retirees will have a full opportunity to present evidence in support of their reading of the labor agreement. Based on that evidence, a contract interpretation decision will be rendered, which either party will be able to appeal further. In short, this case presents a textbook example of why interlocutory review is not necessary.

III. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY IMPORTANT FEDERAL POLICY

Petitioner and its supporting Amicus argue that crucial issues of national economic importance are at stake in this case. But, as described above, the only issue decided

by the court below was whether and in what circumstances extrinsic evidence can be used to shed light on ambiguous language in a labor agreement. The court's conclusion that consideration of extrinsic evidence is proper in this case because the contract language is not clear is nothing more than hornbook contract law. There is no issue of national significance implicated in this decision.

Contrary to Petitioner's claim, the Seventh Circuit's decision presents no threat to the provisions or policies of ERISA. As Petitioner recognizes, ERISA does not require welfare benefits to vest as a matter of law but permits them to vest by agreement of the parties. *See Ryan v. Chromalloy American Corp.*, 877 F.2d 598 (7th Cir. 1989). There is nothing in the language or policy of ERISA that expresses a preference for or against vesting of these benefits by agreement. *United Paperworkers International Union v. Champion International Corp.*, 908 F.2d 1252, 1256 (5th Cir. 1990). The Seventh Circuit decision in this case is merely a step in the process of determining the nature of the parties' agreement on the issue of vesting so that the agreement, whatever it is, can be enforced. The decision is entirely neutral on the issue of vesting of welfare benefits, and this neutrality is entirely consistent with ERISA.

Nor does the Seventh Circuit's decision undermine ERISA's requirement that benefit plans be set forth in writing. The retiree insurance plan in this case is contained in a written collective bargaining agreement. The Seventh Circuit's decision is not an attempt to enforce free-floating oral promises or to undermine the written agreement. Instead, it merely instructs the district court to determine the meaning of the written language in a manner consistent with the intent of the contracting parties. Consistent with basic rules of contract construction, the Seventh Circuit requires consideration of extrinsic evi-

dence in this case only because the written language is ambiguous.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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